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No. 89-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT FLORIDA GAS TRANSMISSION CORPORATION IN OPPOSITION

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September 15, 1989

QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act ("NGA") bar consideration of Petitioner's claim?

2. Does an administrative agency or a reviewing court commit reversible error by not discussing one of Petitioner's arguments when the decisionmaker already has found (without challenge herein by Petitioner) that granting the relief requested will violate the NGA prohibition against granting undue preferences?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
1. The Court Below was Not Authorized to Consider Petitioner's Claim	3
2. Petitioner Did Not Raise the Issue It Presents Herein to the Court Below	4
3. The Traditional Reasons for Issuing a Writ are not Present	4
4. The FERC has no Authority to Grant the Relief Petitioner Seeks	5
CONCLUSION	6
APPENDIX	

TABLE OF AUTHORITIES

	Page
JUDICIAL DECISIONS:	
Consolidated Gas Co. v. *City Gas Co.*, 665 F.Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989)	2
STATUTES:	
Natural Gas Act:	
Section 4(b), 15 U.S.C. § 717c(b) (1982)	5
Section 19(b), 15 U.S.C. § 717r(b) (1982)	1, 3
MISCELLANEOUS:	
Consolidated Gas Co. v. *Florida Gas Transmission Co.*, FERC Docket No. CP82-342-000 (Motion for Stay of Order, filed Jan. 24, 1985)	2

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STATUTES INVOLVED

In addition to the provisions cited by Petitioner, Section 19(b) of the NGA, 15 U.S.C. § 717r(b) (1982), also is relevant to the issues herein. This section is reproduced in the Appendix hereto.

STATEMENT OF THE CASE

The controlling facts are adequately set forth in the two opinions of the court below. Appendix A-2 through A-6, A-25 through A-27. Respondent Florida Gas Transmission Company ("FGT") provides the following additional information in response to assertions of the Petitioner.

Petitioner has not fairly and accurately described the district court decision on which it relies. In *Consolidated Gas Co.* v. *City Gas Co.*, 665 F.Supp. 1493 (S.D. Fla. 1987), *aff'd*, 880 F.2d 297 (11th Cir. 1989), the district judge did not find that the Federal Energy Regulatory Commission's ("FERC") "position is in violation of the antitrust law." Petition at 11. Nor did he conclude that "the agency decision is an insurmountable obstacle to competition." *Id.*

The district judge did not attack the FERC's decision in any respect, apparently accepting that decision as a valid exercise of the FERC's authority under the NGA. Based on the facts before him, the district judge did state that Petitioner's payment of the costs of interconnection with FGT caused him to have "grave doubt" that Petitioner's proposed natural gas operations could have been competitive, 665 F.Supp. at 1534, and that such payment "would potentially have made [Petitioner] uncompetitive." *Id.* Nothing in the opinion, however, approaches the types of findings asserted by Petitioner.

Moreover, whatever findings the district court record may have supported, Petitioner took a different position before the FERC. Indeed, Petitioner contended throughout the FERC proceedings that its proposed conversion from propane to natural gas service would be financially and economically feasible whether or not it was required to pay the costs of connecting to FGT. *See, e.g., Consolidated Gas Co.* v. *Florida Gas Transmission Co.*, FERC Docket No. CP82-342-000 (Motion for Stay of Order, filed Jan. 24, 1985), at 2.

Even assuming that the district court's opinion bears on the validity of the decisions below, Petitioner has been awarded full compensation for any actual damages from competitive injuries resulting from the acts complained of, and that award has been trebled pursuant to the antitrust laws. The result of granting the relief Petitioner seeks herein would be yet another recovery for the same acts.

REASONS FOR DENYING THE PETITION

1. The Court Below was Not Authorized to Consider Petitioner's Claim

Petitioner never presented to the FERC the alleged error that it now claims warrants exercise of the Court's jurisdiction. Section 19(b) of the NGA bars consideration by a reviewing court of any claim not raised in an application for rehearing filed with the FERC absent a "reasonable ground for failure to do so." 15 U.S.C. § 717r(b) (1982). The fact that the district court's opinion was issued after Petitioner filed its application for rehearing does not provide such a "reasonable ground." Petitioner had ample opportunity to present its arguments regarding the alleged effect of the district court's opinion and failed to do so. For example, prior to the FERC's decision on rehearing, Petitioner could have, but did not, file a supplement to its application for rehearing or lodge the district court opinion with the FERC, together with an explanation of its alleged relevance.[1] After rehearing was denied, Petitioner did not exercise its option to seek FERC reconsideration of the order on rehearing and did not avail itself of the opportunity provided by Section 19(b) of the NGA to seek a court of appeals' remand for the presentation of additional evidence. Under these circumstances, and given Section 19(b)'s express terms, the failure of the court below to address the issue does not give rise to an error warranting issuance of a writ of certiorari.

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[1] Providing a courtesy copy to lower level FERC staff, Petition at 7, obviously does not satisfy the statutory requirement.

2. Petitioner Did Not Raise the Issue It Presents Herein to the Court Below

Even in the court below, Petitioner did not urge, as it does here, that the district judge had found the FERC's decision to have an anticompetitive effect. Instead, Petitioner cited the district court opinion as support for its claim that requiring Petitioner to pay for the costs of interconnecting with FGT would unduly discriminate against Petitioner by placing it at a competitive disadvantage compared to other FGT customers, including the defendant in the antitrust case, whom FGT connected to its system at little or no charge in the 1960's and early 1970's. That argument—resolution of which involved issues of tariff construction and the application of NGA standards—was rejected by the FERC and the court below. Apparently recognizing the futility of pursuing that issue before this Court, Petitioner does not challenge those determinations herein, Petition at 15, and instead has pursued a new avenue of attack. Issuance of a writ to review such a newly formulated claim is inappropriate.

3. The Traditional Reasons for Issuing a Writ are not Present

This case presents no conflict between the decision below and decisions of either other courts of appeals or this Court. There are no constitutional or federal statutory issues, or any general issues of overriding importance raised by the Petition. There are no similar issues pending in other cases before the Court. Furthermore, the issues below will not arise again. The defective tariff language that gave rise to Petitioner's claim below has been corrected. App. at A-14.

In short, the Petition suggests no valid reason to extend further the tortured history of this case. Petitioner has not succeeded in shifting the costs of connection from itself to FGT and its existing customers, notwithstanding detailed review of its claims in four FERC decisions and two opinions of the court below. The result of these cases is fair and

consistent with longstanding principles of administrative decisionmaking and appellate review. Therefore, no purpose would be served by issuance of a writ.

4. The FERC has no Authority to Grant the Relief Petitioner Seeks

The NGA specifically precludes FERC action that would create an undue preference for any customer or group of customers. Section 4(b) of the NGA, 15 U.S.C. § 717c(b) (1982). App. at A-63. The FERC held—and was affirmed by the court below—that a decision requiring FGT and its other customers to pay for Petitioner's connection to FGT would "confer an undue preference on new customers [like Petitioner] over the existing cusotmers." App. at A-10 (footnote omitted.) Petitioner specifically states that it is not challenging either the FERC's decision on this issue or the affirmance thereof by the court below. Petition at 15. Because granting the relief Petitioner seeks would create exactly the same undue preference already found unlawful, that relief is clearly beyond the FERC's power and no benefit would be gained from a remand.

Finally, Petitioner is asking that FGT and its customers pay the costs of interconnection because of alleged harm caused by allegedly anticompetitive acts of one FGT customer. This request is not only illogical on its face but also constitutes a claim against FGT and its customers for damages. The FERC has no authority to award damages. That is the province of the courts.

CONCLUSION

For the above reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

Section 19(b) of the Natural Gas Act,
15 U.S.C. § 717r(b)(1982)

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgement and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.